Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

* * *

NO. 78-6

* * *

HILMAR G. MOORE, ET AL.,
Appellants

vs.

JOHN PLEASANT SIMS, ET AL.,
Appellees

* * *

APPELLANTS' BRIEF ON THE MERITS

* * *

OF COUNSEL:

KATHRYN A. REED
Assistant Attorney General

ANN CLARKE SNELL
Assistant Attorney General

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512/475-4638

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

QUESTIONS PRESENTED BY THE APPEAL 3

STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENT 9

ARGUMENT

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION 10

A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES 12

B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW 17

C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS 19

D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT 22

E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN 23

II. WHETHER A CASE OR CONTROVERSY EXISTED . 25

A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD LITEM, WERE NEVER ASKED TO DO SO, NEVER REFUSED TO DO SO, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT ONE BE APPOINTED 26

B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM 27

C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES 28

D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' A TIMELY HEARING 30

E. THE DISTRICT COURT'S ORDER REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE ... 31

F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY 32

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL 33

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM 33

B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD 39

C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD AT THE EMERGENCY EX PARTE HEARING 42

D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS 43

CONCLUSION 48

CERTIFICATE OF SERVICE 50

TABLE OF AUTHORITIES

CASES

Alsager v. District Court of Polk Co., Iowa, 406 F.Supp. 10 (S.D. Iowa 1975) 44

Alsager v. District Court of Polk County, 545 F.2d 1137 (8th Cir. 1976) 44

Andrews v. Dewberry, 242 S.W.2d 685 (Tex. Civ. App.—Ft. Worth 1951, writ ref'd n.r.e.) 45

Boddie v. Connecticutt, 401 U.S. 371 (1971) 41

Boenker v. Boenker, 405 S.W.2d 843 (Tex. Civ. App.—Houston, 1966, writ dism'd) 45

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 25

Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961) 41, 42

Cassidy v. Fuller, 568 S.W.2d 845 (Tex. 1978) 25

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 24

Dombrowski v. Pfister, 380 U.S. 479 (1965) 13, 15

Flast v. Cohen, 392 U.S. 83 (1968) 25

Fuentes v. Shevin, 407 U.S. 67 (1972) 34, 41

Hall v. Beals, 396 U.S. 45 (1969) 46

Hicks v. Miranda, 422 U.S. 332 (1975) 22

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 10, 11, 17, 18, 19, 20

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 36

Juidice v. Vail, 430 U.S. 327 (1977) 13, 24

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 43

Marbury v. Madison, 1 Cranch 137 (1803) 26

Massachusetts v. Mellon, 262 U.S. 447 (1923) 47

Meadows v. Green, 524 S.W.2d 509 (Tex. 1975) 45

Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) 41

Monell v. Department of Social Services of the City of New York, 98 S.Ct. 2018 (1978) 30, 32

Morrissey v. Brewer, 408 U.S. 471 (1972) 42

Newton v. Burgin, 363 F.Supp. 782 (W.D. N.D. 1973) [*aff'd*, 414 U.S. 1139 (1974)] 34, 40, 41

Omohundro v. Matthews, 341 S.W.2d 401 (Tex. 1960) 45

O'Shea v. Littleton, 414 U.S. 488 (1974) 26, 28, 46, 47

Paul v. Davis, 424 U.S. 693 (1976) 34, 35, 36

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 34, 35

Rizzo v. Goode, 423 U.S. 362 (1976) 27, 29, 30, 32

Roe v. Wade, 410 U.S. 113 (1973) 31, 38, 48

Sanders v. Harder, 227 S.W.2d 206 (Tex. 1950) 45

Sims v. State Department of Public Welfare, 438 F.Supp. 1179 (S.D. Tex. 1977) ..... passim 2

State v. Turner, 556 S.W.2d 563 (Tex. 1977), *cert. denied*, 98 S.Ct. 1499 (1978) 45

Steffel v. Thompson, 415 U.S. 452 (1974) 21

Tarver v. Smith, 78 Wash.2d 152, 470 P.2d 172 (1970), *cert. denied* 402 U.S. 1000 (1971) 35

Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971), *cert. denied* 405 U.S. 996 (1972) 32

Trainor v. Hernandez, 431 U.S. 434 (1977) 16, 19, 20, 21

Warth v. Seldin, 422 U.S. 490 (1975) 28, 32

Watson v. Buck, 313 U.S. 387 (1941) 11

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 36

Younger v. Harris, 401 U.S. 37 (1971) 10, 11, 15

STATUTES

TEXAS FAMILY CODE

Chapter 11 30
Section 11.04 ..... 7, 24
Section 11.05 ..... 7, 24
Section 11.06 ..... 7, 25
Section 11.08 24
Section 11.10 ..... 27, 43
Section 11.11(b) 8
Section 11.14 22
Section 11.17 24
Chapter 15 46
Chapter 17 42
Section 17.01 40
Section 17.02 6
Section 17.03 6
Section 17.04 ..... 6, 8
Section 17.06 ..... 16, 19
Section 34.06 ..... 33, 38

TEXAS PENAL CODE

Section 22.04 18

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION:

Article III 26
Article III, § 2 46
Amendment 14 32

28 U.S.C.
§ 1253 2
§ 1331 ..... 2, 32
§ 1343 ..... 2, 32
§ 2101(b) 2
§ 2201 ..... 2, 32
§ 2202 ..... 2, 32
§ 2281 ..... 2, 8
§ 2284 2
§ 2284(3) 8
42 U.S.C.
§ 1981 ..... 2, 32
§ 1983 2

MISCELLANEOUS

Fed. R. Civ. P. 65(b) (2) 8
Tex. R. Civ. P. 680 and 681 8
McCormick's Handbook of the Law of Evidence, 2nd Ed. (1972) p. 797, fn. 73 45
Shepard, "The Abused Child and the Law," The Rights of Children, 174, 182-83 (1973) 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES; JEROME CHAPMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; GENE LEGE, INDIVIDUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE MONTGOMERY COUNTY WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,

Appellants,

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

* * *

APPELLANTS' BRIEF ON THE MERITS

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Appellants, Hilmar G. Moore, et al., respectfully submit this their Brief on the Merits.

OPINION BELOW

The opinion of the three-judge District Court for the Southern District of Texas, Houston Division is reproduced in Appendix, page 61, and is reported at 438 F.Supp. 1179 (S.D. Tex. 1977).

JURISDICTION

On April 19, 1976, this suit was brought under 42 U.S.C. §§ 1981 and 1983 and under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. Pursuant to 28 U.S.C. §§ 2281 and 2284, as they then existed, a three-judge court was convened to determine the constitutional issues raised by Plaintiffs. The Amended Judgment of the District Court (A. 100) was entered on March 8, 1978. Notice of Appeal (A. 106) was filed in the District Court on April 20, 1978, pursuant to 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The applicable statutes are set out in Appendix I, Volume II, p. A-131 and Appendix J, Volume II, A-182, of Appellants' Jurisdictional Statement.

QUESTIONS PRESENTED BY THE APPEAL

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

II. WHETHER A CASE OR CONTROVERSY EXISTED

A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD LITEM, WERE NEVER ASKED TO DO SO, NEVER REFUSED TO DO SO, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT ONE BE APPOINTED

B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM

C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' TIMELY HEARINGS

E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER,

OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM, FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

STATEMENT OF THE CASE

In this litigation Appellees, John and Mary Sims, contend that major portions of Title 2 of the Texas Family Code which are designed to protect children from abuse and neglect are unconstitutional infringements of family integrity. Appellants, officers and employees of the Texas Department of Human Resources (formerly the State Department of Public Welfare) received on March 25, 1976, a report of physical abuse to a child, Paul Sims, and dispatched a worker, Rex Downing, to investigate the report. (*Sims*, A. 65.) Mr. Downing found visible physical injury to eight-year-old Paul and learned that the injuries were inflicted when Mr. Sims came to Osborne Elementary School in Houston, Texas, where Paul was a student, and beat the child. (Deposition of Rex Downing, p. 58; Sworn Statement of Dr. Marie L. Surgi, p. 43.) The boy had

also been spanked on the previous night by Mrs. Sims. (Deposition of Mary Louise Sims, p. 23.)

In order to protect Paul and his two young sisters from further harm and to determine the extent of their injury, the Department took the children into temporary custody and had them examined by a physician. (Deposition of Rex Downing, p. 15.) The doctor found all three children were battered. Paul was injured to such an extent that he had to be admitted to St. Joseph's Hospital where he was treated for eleven days. (Sworn Statement of Rex Downing, pp. 44 and 55; Sworn Statement of Dr. Marie Surgi, p. 44.)

After taking protective custody of the children, Mr. Downing met with supervisory personnel at the Department that afternoon; the group decided that a suit for protection of a child in an emergency under Section 17.02 of the Code should be filed in Houston, Harris County, Texas, where the children were found. The suit was filed in the District Court of Harris County on March 26, 1976, the day after the children's removal. Judge Robert Lowry issued an emergency ex parte order appointing the Department temporary custodian of the children. (*Sims*, A. 66.) Section 17.04 provides for these emergency orders. The statute does not require service on the parents at this emergency stage of the proceedings, Section 17.03, and none was made. The Sims had actual knowledge of the suit and retained an attorney on the day the suit was filed. (Sworn Statement of Rex Downing, pp. 38-40.)

On March 31, 1976, the Sims appeared personally and through their attorney who submitted a motion to modify the order. A hearing on such a motion is statutorily mandated, but Judge Lowry was temporarily absent. Therefore, the motion was not filed by the court clerk; rather, it was returned to the Sims attorney. Instead of pursuing a hearing on the motion, the Sims filed a petition for a writ of habeas corpus. At a

hearing on the habeas petition held April 5, 1976, Judge Lowry determined that the children were residents of Montgomery County, Texas, and verbally transferred the proceedings to the district court in Montgomery County. The Sims' attorney pursued that habeas action no further. (*Sims*, A. 66-67.)

The Department, seeking continued custody of the children so that further investigation and work with the family could be done prior to any disposition of the case, filed a suit affecting the parent-child relationship in Judge Lowry's court that afternoon. The judge issued a temporary restraining order continuing temporary custody in the Department and transferred the suit to Montgomery County where the children resided and continuing jurisdiction lay. *See* Sections 11.04, 11.05, and 11.06 of the Code. (*Sims*, A. 67.)

The Sims and their attorney had actual knowledge that the court had decided that the children resided in Montgomery County and that any suit affecting their relationship to their parents was in the continuing jurisdiction of that court. (Deposition of Gladys R. Goffney, p. 29.) The Sims' attorney was notified that the suit was pending in Montgomery County and that a hearing had been set for May 8, 1976; citation was not issued. (Deposition of Rex Downing, p. 42.) At no time did the Sims ask for an earlier hearing or seek mandamus directing a hearing.

On April 19, 1976, the Sims filed this cause in the United States District Court for the Southern District of Texas, Houston Division. The Sims' application for a temporary restraining order in their cause in the federal district court was denied by Judge John Singleton on April 20, 1976. A hearing on their application for a temporary injunction was set for April 29 (Order of April 20, 1976) and later reset for May 5. When the Department received notice on April 22, 1976, of the suit in federal district court, State court proceedings were

suspended foreclosing the Department's opportunity to resolve the matter. The Sims returned to State court and filed on May 4, 1976, a motion for leave to file an original petition for writ of habeas corpus with the Court of Civil Appeals of the State of Texas, Fourteenth Supreme Judicial District. The motion was denied for want of jurisdiction. (*Sims*, A. 67-68.)

At the hearing on May 5, Federal District Judge Singleton found the children were not legally in the Department's custody because the temporary orders issued by the State court had expired by operation of law. *See* Sections 17.04 and 11.11(b) of the Code and Rules 680 and 681 of the Texas Rules of Civil Procedure. Judge Singleton ordered the children returned immediately to their parents and determined that the Department was *not* enjoined from taking proper action to gain custody of the children. (*Sims*, A. 68.)

The Department filed a new suit in Montgomery County on May 14 seeking custody of Paul Sims. (*Sims*, A. 68.) Under this new suit, Judge Ernest Coker, Sr., issued a show cause order and a writ of attachment ordering that Paul Sims be delivered to the temporary care of his maternal grandparents (by adoption), Mr. and Mrs. James Carter. A show cause hearing was set for May 21, but the Sims avoided service of citation and attachment by absenting themselves from residence, school, and place of employment until May 21. The hearing was reset for June 21. (Sworn Statement of Carol Jones, pp. 30-33.)

Meanwhile, the Sims filed a second application for a temporary restraining order in federal district court without notice, actual or otherwise, to the Department, and this time Judge Singleton issued, in apparent violation of Rule 65(b)(2), Fed. R. Civ. P. and 28 U.S.C. §§ 2281 (repealed Aug. 12, 1976) and 2284(3), an ex parte order forbidding the attachment. (Temporary Restraining Order of May 5, 1976.) When the requested

three-judge court was constituted, a hearing was held on June 7. At the hearing, a preliminary injunction which prohibited further proceedings in State court pending a final hearing on the merits in federal district court was issued. (*Sims*, A. 68.) Trial on the merits on October 26, 1976, resulted in judgment for the Sims. (A. 100.)

SUMMARY OF THE ARGUMENT

Principles of equitable restraint and comity required abstention by the federal district court. All proper constitutional issues could have been raised in State court. The injunction ordered by the federal district court interfered with the State's enforcement of statutes designed to protect the same interests which underlie its criminal law. Further, by enjoining this suit brought by the State in its sovereign power, the federal district court reflected negatively on the State courts' ability to adjudicate federal claims. Finally, suit was filed in State court before any substantive action had taken place in federal court.

The federal district court did not have jurisdiction of this litigation because no case or controversy existed between the Sims and the Department. The Department was an improper party against whom to raise issues concerning the appointment of an attorney ad litem. It had no power to appoint such an attorney, was not asked to appoint one, and never refused to do so. The Department's request that the federal district court appoint an attorney ad litem was denied. The Sims were not injured by the child abuse reporting system since the information collected was never disseminated and any alleged threat of future injury was so remote as to be mere conjecture. The preponderance standard of proof required by State statute in cases involving termination of parental rights was never applied to the Sims. The Department neither controlled the State court's docket nor caused delay of any hear-

ings in this case. Issues involving custody of the Sims' children were moot since the federal district court returned the children to the Sims long before proceedings on the merits in this cause began. Moreover, since the Sims did not establish a case or controversy, jurisdiction could not be conferred by the federal statutes upon which they relied.

State statutes attacked by the Sims comport with constitutional requirements. Any disruption of the Sims' privacy is constitutionally permissible because of the State's compelling interest in protecting children's welfare and the child's right to be free from serious injury. The State's compelling interest in protecting children's personal right to be free from serious injury by adults, which underlies child abuse statutes, outweighs the necessary and reasonable infringement on parents' rights. The federal district court's holding that a hearing must be held on the "very day" of emergency removal of children from their parents is unreasonable and exceeds due process requirements. The standard of proof in cases involving termination of parental rights is preponderance of the evidence which meets due process requirements and is the only standard used by lay factfinders in any civil litigation in Texas.

ARGUMENT

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

The long-established rule that federal courts will not enjoin state court proceedings controlled in the instant case and required abstention. *Younger v. Harris*, 401 U.S. 37 (1971). Standards of equitable restraint when federal courts are requested to interfere with state court civil functions go far beyond the stringent standards of private equity jurisdiction. *Huffman v. Pursue*, 420 U.S. 592, 603 (1975). In addition to finding

that a federal plaintiff has no adequate remedy at law and will suffer great and immediate irreparable injury if equitable jurisdiction is denied, the federal court must consider ideas of comity which are basic to our federalism. Comity posits that the national sovereign fares best when the states and their institutions are left free to perform their separate functions. *Huffman, supra*, at 601; *Younger, supra*, at 44. The balance struck between state and federal courts is especially delicate when the federal court is asked to declare a state statute unconstitutional. Even a showing that a statute on its face violates rights protected by the Constitution will not justify a federal injunction to prevent a state's good faith attempts to enforce its constitutionally infirm statute. *Huffman, supra*, at 602; *Younger, supra*, at 49 and 53; *Watson v. Buck*, 313 U.S. 387 (1941). Absent a showing of bad-faith prosecution or harassment by the state in bringing suit or some equally egregious and extraordinary circumstances which will result in irreparable damage to the person being sued by the state, a federal court wrongfully exercises its equity jurisdiction to enjoin state court proceedings. *Younger, supra*, at 54.

This case is a classic example of what can happen when federal courts do not accept the seriousness of the consequences which result from interference with state civil functions. In *Huffman, supra*, at 603, this Court said that "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

In *Huffman* the Supreme Court refused to confine the doctrine of restraint promulgated in *Younger* to state criminal proceedings. Although the Court in *Huffman* was not required to decide whether the doctrine of judicial restraint would be applicable to all civil lit-

igation, it is clear that *Huffman* extends the considerations of comity and federalism to state civil litigation. These principles are particularly relevant to litigation such as that involved in this case, litigation which sought to allow the State to take prompt action on a matter involving the health and safety of a child who had been subjected to severe physical abuse. (*See* Defendants' Exhibits 6 and 7, A. 55.)

Huffman established the rule that federal courts should apply the principles of comity and federalism to both pending state court proceedings which are in the initial stages of adjudication as well as those which are making their way through the state appellate process. The decision also notes that civil litigants may seek review in the Supreme Court of any federal claim properly asserted in and rejected by state courts.

This Court, in *Huffman*, has noted that a federal district court may intervene in those cases where it *properly finds* that the state proceeding is motivated by a desire to harass, or is conducted in bad faith, or where the challenged statute is ". . . flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." By no stretch of the imagination can these standards be met in this case, and the opinion of the court below shows on its face that they were not.

I. A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

At the time of the filing of this proceeding in federal court, Appellees had an *opportunity* to present their federal claims in a suit pending in State court,

and no more is required to invoke *Younger* abstention, *Juidice v. Vail*, 430 U.S. 327, 336-337 (1977). The three-judge court herein dealt with abstention as a threshold issue and concluded that *Younger* principles did not apply. Two reasons were offered to justify this conclusion: ". . . the nature of the state action and the nature of the plaintiff's (sic) challenge." (*Sims*, A. 72.)

Characterizing the state action as "multifaceted," the court said that the dispute between Appellees and the State of Texas would involve more than a single state judicial proceeding in which Appellees could raise their constitutional defense. (*Sims*, A. 72.) The Supreme Court's interpretation of inability to defend in a single proceeding in state court was demonstrated in its application of that exception to the *Younger* rule against enjoining of state court proceedings in the case of *Dombrowski v. Pfister*, 380 U.S. 479 (1965). There, Plaintiffs were harassed by repeated arrests, seizures, and threats of prosecution because of their race. None of the prosecutions was intended to be carried to its judicial conclusion. Each was brought to intimidate, not to permit resolution in the state courts. Because many suits had been and would be brought and none would be pursued to judgment, the federal plaintiffs would be unable to defend themselves in a single suit in state court, not because their complaint was multifaceted and would require multiple defenses.

Multifaceted litigation can be effectively tried in state court proceedings. Indeed, state courts are often less pressed by time constraints caused by overcrowded dockets and, thus, can better deal with extensive discovery and lengthy development at trial than can three-judge federal courts which require the attendance of three busy jurists who are frequently unable to spend the time necessary to allow full development of the facts in multifaceted litigation. Multifaceted state action which allegedly violated Appellees' right to privacy under the United States Constitution and improp-

erly impinged on their right to family integrity could be raised as a defense or as a counterclaim in a single proceeding in State court.

Two suits were filed and pending in the State courts prior to the federal district court's taking any action of substance in this cause. The federal district court found that neither of the suits was brought for harassment. The first suit, which was filed in Harris County and in which an attempt was made to transfer to Montgomery County, was pending when the federal district court issued a temporary restraining order returning the children to Appellees. At that time, the federal district court expressly instructed Appellants that the temporary restraining order did not prevent their taking proper steps to seek custody of the children in appropriate judicial proceedings. (*Sims*, A. 68.) Appellants then filed a second suit in Montgomery County. Both suits sought the same relief; a final decision on the merits in either would have rendered the other *res judicata*. Under these circumstances, the pendency of two suits in State court did not mean that Appellees could not defend themselves in a single proceeding in State court.

In the section of its opinion in which it characterized the state action in *Sims* as multifaceted, the court pointed out that:

> Many of the chalienged actions taken by the state do not and will not involve any judicial proceeding. (*Sims*, A. 72.)

To illustrate non-judicial application of a statute, the federal district court described the child-abuse reporting system. (*Sims*, A. 92, n. 5.) The illustration is not illuminating. The normal everyday application of statutes without judicial involvement does not make state action mysteriously or uncommonly multifaceted. It is desirable for almost every statute to be applied without

judicial involvement. The lack of initial judicial involvement is not an extraordinary circumstance which should permit a federal court to find an exception to *Younger* under which it may enjoin state court proceedings.

The federal district court found procedures for emergency removal of a child from his parents' custody "patently and flagrantly violative of basic constitutional guarantees." (*Sims*, A. 75 and A. 90, n. 1.) Immediately thereafter, the court narrowed, interpreted, and rewrote the provisions it found constitutionally infirm. In so doing, it ineluctably demonstrated that each statute is not ". . . violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

Finally, the federal district court found substantial portions of the Texas Family Code unconstitutional on their face, and permanently enjoined Appellants from applying and enforcing them. (*Sims*, A. 88.) The preceding directives of that court made it unmistakably clear that Appellants were in fact enjoined only from applying the portions in any manner except that preferred by the court. However zealous the federal district court might have been, and even if it spoke in hyperbole, it clearly did not prohibit the use of all existing statutory procedure to remove children from immediate danger until an acceptable rewriting of the statute. (*See* discussion of *Dombrowski*, *supra*, in *Younger*, *supra*, at 51-54.) The federal district court's modifications of the challenged statutory provisions negated its characterization of any of the offensive provisions as "patently and flagrantly violative of basic constitutional guarantees."

As further basis for its assertion that an injunction was appropriate, the federal district court found highly unusual circumstances brought this case within excep-

tions set out by this Court in *Younger* and *Trainor v. Hernandez*, 431 U.S. 434 (1977), and found these circumstances compelled the court to grant equitable relief. The court said:

> . . . the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time . . . justify equitable relief even if *Younger* principles did apply. (*Sims*, A. 75.)

Though this Court has not set a rigid rule defining extraordinary circumstances which allows enjoining of state court proceedings, the exceptions devised under *Younger* clearly imply intentional violation of federally protected constitutional rights is required. Bad-faith prosecution, harassment, and statutes obviously written in wanton disregard of the Constitution as interpreted by this Court are examples of extraordinary situations which permit a federal court to enjoin proceedings in state courts. No such knowing or deliberate disregard of Appellees' constitutional rights was found credible by the court below or could have been found credible by any reasonable person.

This case is one in which honest mistakes were made in the application of the Texas Family Code. These mistakes were shared by judges, lawyers, and other State officials. They were not malicious or intentional errors, and the errors could have been corrected by State court remedies. Appellees could have obtained a hearing within a few days by simply insisting on their rights under Section 17.06 of the Texas Family Code. The attorneys for Appellees could easily have sought a writ of mandamus, if necessary, to require that such a hearing be held, but they did not. If they had, relief would undoubtedly have been afforded in the State court system as it was to Plaintiffs below in the consolidated *Woods* case. The state courts can adjudicate constitutional issues, as well as interpret the statutes

passed by their own state legislatures, in a manner consistent with prior state interpretations, if they are allowed to accept and carry out the duty which is theirs absent federal injunctive interference.

Assertions, or even proof, that mistakes, errors, and confusion abounded in a state court's management of the early stages of a proceeding pending before it cannot be said to rise to the level of the extraordinary circumstances that *Younger* admits as exceptions to its rule. The federal courts could neither act as a "primary and powerful" source of vindication of federally protected rights and allow deliberate disregard of federal law, nor act as proponents of comity and our federal system, if they intervened in state court proceedings because state proceedings were initially inept or incorrect or state agencies bungled.

Unfortunately, it cannot be honestly said that judicial confusion, delay, and error are maladies confined to state courts; issuing an injunction on the basis of these unextraordinary circumstances clearly contravenes *Younger* principles. Since harassment, bad-faith prosecution, the necessity of defending multiple suits in state court, flagrant or patent statutory violations of the Constitution, and other extraordinary circumstances were absent in the instant case, *Younger* principles applied in full force and the federal court should have abstained from enjoining State court proceedings.

I. B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

Here as in *Huffman, supra*, the State brought proceedings in State court "to protect the very interests which underlie its criminal laws." The resulting threat to our federal system caused by federal court intervention in state court proceedings is as grave when the

state institutes civil proceedings to enforce its substantive policies as when the state prosecutes under its criminal laws. *Huffman, supra*, at 604.

While State proceedings in this case were civil, the child abuse statutes challenged in this action and enforced in the State courts are designed to protect children from dangerous adults, who, as in this case, often are their parents. This protective purpose of child abuse legislation is closely akin to that underlying criminal statutes. Criminal statutes are merely more inclusive in their protective function; they protect the whole of society from dangerous individuals. Both types of statutes regulate by defining proscribed behavior, by giving notice that the described behavior is prohibited, and by setting penalties for engaging in the prohibited behavior.

Substantive state policies and compelling state interests undergird child abuse statutes. Although parents are rarely criminally prosecuted for assaulting or battering their children unless their conduct results in the child's death, or constitutes sexual abuse so egregious that the community or other children unrelated to the offending adult are threatened, the analogy to criminal statutes remains applicable. *See* Texas Penal Code, Section 22.04 for criminal statute pertaining to injury to a child. But for the deference given to the parent-child relationship, adults who physically injure children would routinely be punished under appropriate criminal statutes.

Another similarity between criminal proceedings and these civil proceedings is the availability of habeas corpus. Enforcement of child abuse statutes often gives rise to parents' seeking writs of habeas corpus to gain possession of a child illegally detained by one not entitled to his custody. As in criminal cases, the availability of habeas proceedings gives the parent two methods of bringing constitutional claims before the court.

See Huffman, supra, at 605 and 606 for a discussion of habeas.

The federal district court's enjoining of proceedings in State court disrupted the State's enforcement of compelling interests similar to those underlying its criminal laws. Thus, this cause was brought within the Court's holding in *Huffman*. There, the Court made *Younger* comity principles applicable to federal judicial interference in civil proceedings which may be considered to be akin to criminal prosecutions.

I. C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

The instant case falls squarely within this Court's holding in *Trainor v. Hernandez*, 431 U.S. 434 (1977). There the state had brought civil proceedings for welfare fraud and attached the recipients' property without notice. *Younger* and *Huffman* principles applied where the state in enforcing its laws took property without notice, absent a showing that state courts were inadequate to resolve the federal due process claims.

Unless it is shown that opportunity to contest the validity of the attachment would be unavailable in state proceedings, the Court observed in *Trainor, supra*, at 440-442 and 447, that it must not assume due process claims would not be addressed in state court proceedings. In *Sims* (A. 75), Appellees had statutory remedies for challenging the validity of the taking of their children by a motion to modify which could have been filed at any time prior to the expiration of the temporary emergency order. Section 17.06 of the Code. Habeas corpus relief was available also. These remedies

were available in addition to the opportunities which would have been available at the trial on the merits and in subsequent appeal.

The court below found "the absence of a fair opportunity to present constitutional claims at a meaningful time" to be one of the highly unusual circumstances justifying immediate federal equitable relief. When viewed in light of this Court's counsel that state appellate courts are the more appropriate forum for resolving constitutional contentions, *Huffman, supra*, at 609, the federal district court's assertion that no fair opportunity to present constitutional claims at a meaningful time existed is unwarranted. The fact that Appellees were frustrated in initial presentation under these provisions does not show that they could not have resolved their constitutional claims. Thus, here as in *Trainor, supra*, at 447, one cannot fairly conclude that State remedies were inadequate to vindicate federal constitutional claims.

This Court in *Trainor, supra*, at 446-447, further emphasized the importance of applying *Younger* principles in state enforcement proceedings when it required that the federal district court have some basis for finding a statute violative of express constitutional prohibitions in every clause, sentence, and paragraph. Refusal to permit the unsubstantiated labelling of a statute as flagrantly and patently violative of constitutional rights necessarily precludes that same characterization of some of the statutory provisions challenged herein. (*Sims*, A. 75.) Since any purported constitutional infirmities of the statutes cannot be shown to arise from wanton disregard of constitutional rights, no extraordinary circumstances existed in this case to allow an exception to the rule that federal courts ordinarily will not enjoin state court proceedings.

Analyzing a state's dilemma when its enforcement proceedings are disrupted by federal court proceedings, this Court said such action:

> . . . confronts the State with a choice of engaging in duplicative litigation . . . risking a . . . federal injunction, or of interrupting its enforcement proceedings. . . . *Trainor, supra*, at 445.

Of course, the State of Texas did not have to risk a federal injunction; it has had to live with one. As a result of the federal injunction, the State lost its opportunity to prove that Appellees had abused their children and was prevented from taking any further action to protect the children. Comity principles clearly required that the State, acting in its sovereign capacity to protect its minor citizens, be allowed to go forward with State proceedings in which Appellees could raise their constitutional claims and after which Appellees could appeal to this Court as a matter of right. Federal interference with State court proceedings reflected negatively on the State court's ability to carry out its responsibility to safeguard constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974).

Because of the interference of the federal district court with the operation of the Juvenile Court of Montgomery County, Appellants have been completely frustrated in their efforts under the Texas Family Code to deal constructively with the family situation of the Sims and their children. The issues going to the welfare of the Sims' children have not been addressed. Under the guise of protecting family integrity Paul Sims was returned to parents whose cruel disciplinary procedures required his hospitalization for eleven days. The Sims discontinued counseling which might have helped to strengthen their family and to build a healthier home environment for the Sims and their children. Counseling aimed at helping Paul Sims cope with his

environment and resolve his personal problems was discontinued.

No hearing as provided for in Section 11.14 of the Texas Family Code has been held on the merits of this case. Separate and apart from the compelling interest of the State to intervene on Paul Sims' behalf and separate and apart from the interests of his parents, the guardian ad litem appointed by the juvenile court has been denied opportunity to represent his interests before any court. The interests of Paul Sims have been laid aside. "Family integrity" has been preserved by abrogating the personal rights of the Sims' children. Possible recurrence of excessive physical discipline and other forms of parental aggression is a danger which the State could have addressed had it been permitted to carry out its legitimate functions as lawmaker, social service provider, and judicial arbiter.

I. D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

A further holding of this Court in the *Younger* line of cases was made in a context similar to that of the instant case and forbade federal court interference with state criminal proceedings filed *after* the federal complaint but before any substantive proceedings on the merits in the federal court. *Hicks v. Miranda*, 422 U.S. 332 (1975). To hold otherwise, the Court reasoned, would trivialize *Younger* principles. *Hicks*, *supra*, at 350. In the case now presented, Appellants had filed a second suit in Montgomery County on May 14, 1976, after Judge Singleton advised Appellants at a hearing on May 5 that they could file a proper suit to protect the Sims children. (*Sims*, A. 68.) When Appellants

filed their second suit, they believed that by seeking to protect only Paul Sims and by obtaining a writ of attachment to place the boy with his adopted grandparents they were complying with Judge Singleton's earlier counsel. This second proceeding pending in State court before the three-judge court had taken any action on the merits — all earlier action was by Judge Singleton alone — was acknowledged in the federal district court's opinion but was not discussed. The federal district court seems to have regarded it as unimportant, but *Hicks*, *supra*, at 349, clearly makes this filing of such a suit call for the application of *Younger* principles in full force.

In *Hicks*, *supra*, the state proceedings were criminal but the Court's decision did not turn on the characterization of the state proceedings. Rather it firmly rested in the principles of comity which enable dual sovereigns to perform their overlapping functions with integrity. Vague and conclusory findings of bad faith and harassment would not be sufficient to call into play one of *Younger's* limited exceptions. *Hicks*, *supra*, at 350. Indeed, the Court admonished, a conclusion of bad faith or harassment would not necessarily follow had it been shown that the state courts erred on some issues of federal or state law. *Hicks*, *supra*, at 351. There was no finding of bad faith in the instant cause. Yet the federal district court's apparent perception that procedural irregularity, confusion, and attendant delay hindered Appellees' opportunity to present their constitutional claims was its justification for erroneously granting federal equitable relief even if *Younger* principles applied. (*Sims*, A. 75.)

I. E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

There is no federal family law. Domestic relations have traditionally been solely within the purview of state courts. The State courts' management of venue and continuing jurisdiction (the essence of the problems with the first State court case filed herein) goes to the core of its administration of justice in child custody cases. Much as ". . . the contempt process . . . vindicates the regular operation of . . . [the State's] judicial system . . .," *Juidice v. Vail*, 430 U.S. 327 (1977), the State's insistence upon parents' presenting their children before the appropriate State forum for presentation of questions of custody is an essential element of its enforcement of statutes and of prior decisions in custody disputes. The availability of a federal forum to parents against whom child custody proceedings are pending in State court impedes the State's effort to shape and enforce coherent policy in this area of substantial public concern. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), for a discussion of the appropriateness of abstention when problems of public policy are paramount.

Whether child custody battles arise in the context of divorce or when transient troubled families move from place to place leaving suits affecting the parent-child relationship behind them, venue and continuing jurisdiction of subsequent suits present a complex problem. Venue for suits affecting the parent-child relationship lies where the child resides, Section 11.04 of the Code. Once such a suit is brought, continuing jurisdiction of all subsequent suits affecting the parent-child relationship lies with the court where the original suit was filed, Section 11.05 of the Code. Texas maintains a central file of all such suits and requires that a petition assert that the court in which the suit is filed has continuing jurisdiction or that no court has continuing jurisdiction of the suit being filed, Sections 11.08 and 11.17 of the Code. Complex and relatively new statutory provisions govern the transfer of suits affecting

the parent-child relationship. Texas' appellate courts are in the process of construing these statutes. *See*, e.g., *Cassidy v. Fuller*, 568 S.W.2d 845 (Tex. 1978), in which the Texas Supreme Court interpreted Section 11.06 of the Code.

Judge Lowry's transfer of the habeas corpus proceeding and the suit affecting the parent-child relationship from Harris County to Montgomery County (*Sims*, A. 66-67) was undoubtedly intended to establish venue where the children resided and where continuing jurisdiction of subsequent proceedings properly lay. The State court's management of venue and continuing jurisdiction in child custody suits lies at the core of its administration of justice in the area of family law dealing with the custody and possession of children. The federal district court should have abstained not only under *Younger* principles but also because substantial issues of State policy were involved. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

II. WHETHER A CASE OR CONTROVERSY EXISTED

The threshold inquiry in a federal court is whether the plaintiff has standing to invoke the court's judicial powers to resolve the dispute and to ask the court to use its remedial powers to right asserted wrongs. Standing may be viewed as flowing from the requirement that federal courts decide only cases or controversies, U.S. Const., art. III, and from prudential considerations. Case or controversy requirements limit the judiciary to functioning in an adversary context in which opposing parties hone the issues into the sharpest possible focus for examination by the court called upon to resolve the dispute and place the judiciary in its proper role in our tripartite system. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

Private litigation is almost always justiciable. In the area of constitutional challenges to statutes, the question of justiciability frequently arises and is at issue in the present case. The federal district court's power to decide the constitutionality of a statute is necessarily dependent upon its power to decide a case properly before it. *Marbury v. Madison*, 1 Cranch 137 (1803). In several respects the statutes challenged by Appellees were not properly before the federal district court. Further, Appellees showed neither a likelihood of immediate irreparable harm nor a lack of an adequate remedy at law in order to meet Article III case or controversy requisites with regard to the issuance of equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 502-508 (1974).

II. A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD ITEM, WERE NEVER ASKED TO DO SO, NEVER REFUSED TO DO SO, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT ONE BE APPOINTED

The federal district court had no jurisdiction concerning the State court's failure to appoint an attorney ad litem for the Sims children (*Sims*, A. 86-88), since Appellants were the wrong defendants against whom to raise this issue. No State legislative appropriation or statutory provision gives Appellants the power to appoint attorneys ad litem for children in suits affecting the parent-child relationship in which the State is a party. *See* Section 11.10 of the Code. Even if there were such authority, questions of conflict of interest could be raised with regard to Appellants' exercise of that authority. It is very unlikely that parents would fail to contest the appointment by the Appellants of attorneys ad litem for their children when the Appellants are seeking to remove custody from those parents. However, few litigants would freely confide in an attorney appointed by, or even in the most remote manner beholden to, their opponent in court. Further, Appellants were never asked to appoint an attorney ad litem, never refused to do so, and, in fact, Appellants' motion that the three-judge court do so was summarily denied. (Transcript of 8/4/76, p. 16.) *See Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

The State court judges, who were dismissed as defendants early on in these proceedings (Transcript of 8/4/76, p. 15), were the only persons who could have applied the allegedly unconstitutional provisions in a manner which would have met the constitutional requirements asserted by Appellees. Appointment of an attorney ad litem to protect the interests of a child made subject of a suit seeking termination of parental rights is within the discretion of the judge. *See* Section 11.10(a) and (c) of the Code. (*Sims*, A. 87.)

Of course, even this discussion ignores the fact that a termination suit was never brought by Appellants against Appellees. The lack of application of or injury by the challenged statute, which would have called Section 11.10 into play, clearly makes this issue one as to which there is no case or controversy.

II. B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM

The three-judge court found the gathering and dissemination of information by the Child Abuse and Neglect Report and Inquiry System ("CANRIS") absent judicial involvement to be violative of due process and the right to privacy. (*Sims*, A. 82.)

The relief decreed is a far-reaching and unwarranted interference with the internal affairs of the State as it investigates child abuse since the Appellees were never injured by the CANRIS. *See Rizzo, supra*, at 371-381. No allegation that dissemination of infor-

mation occurred was ever made in this case, and in fact none ever occurred.

The CANRIS prevents any dissemination of information stored therein. Not only were Appellants improper defendants as to any alleged infringement of Appellees' privacy rights, but any alleged violation of due process or privacy rights also resulted in no injury to Appellees. The facts alleged support no "actual causal relationship" between the challenged statute or practices under it and Appellees' alleged injury. Appellees rely upon some remote possibility of injury and thus fail to establish their standing to challenge the CANRIS process. *See Warth v. Seldin*, 422 U.S. 490, 502-508 (1975).

II. C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

The statutory provision for preponderance of the evidence as the standard of proof in suits affecting the parent-child relationship was never applied to Appellees. Since no proceeding in State court moved forward to allow the standard to be used in this case, Appellees were not injured by it even in the pending custody suits. Additionally, no change in policy or increased diligence on Appellants' part could have effected the remedy decreed by the federal district court. The fact of injury caused by the challenged standard could not be demonstrated outside of judicial proceedings. Therefore, the federal district court's finding of a justiciable dispute between Appellants and Appellees rests on mere conjecture that injury might result if the standard were applied.

Any purported threat of immediate irreparable injury with regard to the standard of proof used in termination proceedings was remote indeed. *See O'Shea, supra*, at 502-504. The federal district court based its

finding of standing to challenge Chapter 15 of the Code on the spectre of the future filing of a suit seeking termination of parental rights. The spectre is not a frightening one for several reasons. The only evidence supporting the existence of this apparition was caseworker Rex Downing's statement in a deposition that ". . . he would seek termination as a part of the Montgomery County action . . ." (*Sims*, A. 78.) It is not clear what Mr. Downing meant. Did he mean "I would if I could"? or did he mean "I will"? (Deposition of Rex Downing, p. 27.) The federal district court did not allow live testimony to clarify this ambiguous statement on which it placed great reliance. (Transcript of 8/4/76, p. 17; Transcript of 10/26/76, p. 5.) Further, Mr. Downing had no authority to file a termination suit. He was required to confer with supervisory staff and to obtain a consensus as to the appropriateness of the filing of a petition seeking termination. In any case, Mr. Downing was obviously unable to carry out the purported threat because the suit in Montgomery County had already been filed when the federal district court enjoined all attempts to enforce the challenged State laws against Appellees (*Sims*, A. 67-68); and that suit sought only temporary conservatorship, not termination. (Defendant's Exhibit No. 15.) Finally, and most importantly, Mr. Downing was the lone alleged threatener of termination, and he was not joined as a defendant in these proceedings in federal court. *See Rizzo, supra*, at 371-373.

Parties joined in their official capacity and individually were not shown to have threatened Appellees with filing a termination suit anytime in the future; thus, Appellees had no proper defendant against whom they could raise the issue of threat of immediate irreparable injury under Chapter 15. *See Rizzo, id.* Causation must be shown in actions brought under the Civil Rights Act of 1871, 42 U.S.C. §1983. Liability under the respondeat superior theory will not be imposed on

government officials simply because the agency for which they work employs a tortfeasor. The accused official must be shown to have implemented or executed a policy or statute which violated the complainants' constitutional rights unless governmental custom is shown to have injured the complainants. *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978); *Rizzo, supra*, at 376-377. Therefore, the Sims never had standing to challenge the standard of proof set out by Chapter 11 of the Texas Family Code for a termination case.

II. D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES A TIMELY HEARING

Appellants never refused Appellees a timely hearing. The State court's docket is controlled by the judge or his designee. Since the judges were dismissed from these proceedings at an early stage (Transcript of 8/4/76, p. 15), Appellees were left with no proper party against whom to assert their due process claims concerning injuries caused by departure from the statute's mandate that a hearing be held at the expiration of the ten-day order to determine whether the children should be returned to Appellees or whether a suit affecting the parent-child relationship should be filed.

Failure of Appellees to obtain the filing of or a hearing on their motion to modify was in no way caused by Appellants' conduct. (*Sims*, A. 66.) Appellants did not interfere with the filing of the motion. Appellees might have been able to state a claim against the clerk of the court or the judge, but neither of them was a party to this suit when it was decided on the merits. *See Rizzo, supra*, at 377. Equitable relief was granted against Appellants without adequate showing of responsibility or causal connection between Appellants' conduct and the injury alleged.

II. E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

No live controversy existed between Appellants and Appellees with regard to the possession of the children at the time of the hearing on the merits in this federal proceeding and none exists for appellate review. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (citations omitted). Judge Singleton had ordered the children returned to Appellees (Order of 5/5/76), and Appellants had complied with that order. The children were in the custody of their parents and the issue of custody was not litigated in these or any other proceedings.

In the contest based on the writ of attachment issued in the second suit pending in Montgomery County, questions relating to the possession of Paul Sims were not ripe for judicial determination since Appellees had not been served with citation and attachment had not been levied. Any threat concerning the possible levying of attachment was not an injury for judicial determination. Even if attachment had been carried out and Paul Sims had been temporarily placed with his grandparents, it is not clear what effect his placement would have had upon Appellees' access to him, their enjoyment of his companionship, and the parent-child relationship between Appellees and the boy. The court never learned the proximity of grandparents' and Appellees' living quarters, the status of their relationship, or other relevant facts about the possible effect of levying attachment.

Because Appellees had present custody of their children, issues relating to the timeliness of hearings after removal, notice, and other aspects of removal procedure had become either moot or conjectural and thereby inappropriate for judicial resolution. Judge

Singleton's return of the children under an ex parte order prior to any adversary hearing in federal court had a mooting effect on the issues revolving around possession of the children. The three-judge court's enjoining of State proceedings removed the issue from the case on the merits and had the effect of permanently resolving the issue. *See Warth, supra*, at 516.

II. F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

The right to contract, which is one subject of the Civil Rights Act of 1871, 42 U.S.C. § 1981, was never raised as a real issue in this case, and therefore jurisdiction under it does not lie upon these facts. Appellees stated no cause of action under the general federal question statute, 28 U.S.C. § 1331. Moreover, jurisdiction is not conferred by the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; these sections merely create a remedy. *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699 (8th Cir. 1971), *cert. denied* 405 U.S. 996 (1972). Section 1983 of the Civil Rights Act of 1871 and its companion jurisdictional statute, Section 1343 of Title 28, are the only possible basis of jurisdiction through which a cause of action could have been alleged. However, even under these statutes a federal plaintiff must have a defendant who actually violated the plaintiff's constitutional rights. Respondeat superior theories of vicarious responsibility are impermissible under these statutes which are intended to enforce the 14th Amendment. *Rizzo, supra*, 376-377; *Monell v. Department of Social Services of the City of New York, supra*. In any case, a proper defendant must be shown to have authority and capacity to perform the function desired as relief.

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

The federal district court found that the use of the Child Abuse and Neglect Reporting and Inquiry System (CANRIS, Section 34.06 of the Code) for collecting and storing in a computer information from case records gathered by the State in its legitimate investigation of reports of child abuse is violative of the right of privacy and due process guarantees absent a judicial determination of abuse or neglect. The court said that the State may obtain the information in question and maintain it in investigatory files, but it found that a computerized CANRIS exceeds permissible investigatory purposes. (*Sims*, A. 82.)

Both the federal district court and the State agree that the purpose of investigating reports of child abuse is to protect children who are in danger. That the State has a legitimate interest in protecting children from abuse and neglect is not contested. Maintaining files containing information discovered during investigation assists the State in determining whether protection is needed, and if so, what kind. Investigating reports of child abuse necessarily affects the privacy of the family to some degree. The right to family integrity and the right to preservation of the zone of privacy which surrounds the family are of great importance but they, like other constitutionally protected rights,

are not absolute. Rather, they are subject to reasonable regulation in furtherance of a legitimate state interest. *See Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 164-169 (1944). Pursuant to its legitimate interests the state can make and enforce reasonable laws which do not violate due process. *Newton v. Burgin*, 363 F.Supp. 782 [W.D. N.C. 1973 (*aff'd*, 414 U.S. 1139) 1974]; *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). The federal district court in effect found the State's statutes designed to effectuate its legitimate interest in protecting children were unreasonable; that is, they violated the right to privacy and due process guarantees, not by the investigation process nor by maintaining resulting data, but rather because of the means by which the data was stored.

Appellants asserted above as they do here that the right to privacy is not absolute. The nature of the right to privacy remains to be established. In *Paul v. Davis*, 424 U.S. 693, 713 (1976), this Court said that the right to privacy concerns the areas of marriage, procreation, contraception, family relationships, childrearing and education. The areas enumerated by the Court which are protected by the right to privacy are essentially personal areas in which a wide range of discretion and choice may permissibly be exercised; but they include education, an area which for most of us is largely controlled by the state. Though parents may choose between approved alternatives in educating their children, they are not free to exclude formal education entirely or to educate their children in any manner they devise.

The state places primary, but not exclusive, responsibility for childrearing on the discretion of parents. The rights of parents are shown great deference in the law. The family and the ethnic communities which support and nourish it are given room to function and flourish in our society because these institutions make

positive contributions to the socialization of young people who need to become autonomous citizens in a pluralistic society. Unique family qualities contribute to the richness of the fabric of the whole of society. But while parents are entitled to privacy, they do not have unmitigated discretion in childrearing. The state circumscribes parental choices in the areas of education, innoculation against disease, child labor, and in a plethora of other areas in which protective legislation fosters the nurturance of children. *See Prince, supra*, at 166. The state's interest in education is often superior to that of parents — for example, most of us are intimately acquainted with compulsory school attendance laws.

The federal district court quoted *Davis, supra*, at 713 in its opinion. (*Sims*, A. 82.) The *Davis* Court's inclusion of "education" in its list of concerns protected by the right to privacy makes it clear that even if education is an area in which the choice and discretion characteristic of privacy rights may be available when there are alternatives to public education, and even if it may be surrounded by zones of privacy, it is also an area in which governmental intrusion or participation is strikingly present. From this observation we may infer that the right to privacy not only can be infringed by laws made in accord with the state's legitimate interest but also that it regularly is. *Tarver v. Smith*, 78 Wash.2d 152, 470 P.2d 172 (1970), *cert. denied*, 402 U.S. 1000 (1971). It is unclear how due process fits in where education is concerned because few people are afforded any judicial determination before they are thrown into school; similarly without prior judicial determination, some may be labelled "truant," or a "C student," or something else like "class favorite."

Clearly, this Court was prudent in finding that injury to reputation does not require due process procedures. *Davis, supra*, at 701-710. When a change in

legal status, an adverse effect on property or liberty rights, or a reaching of the very rights implicit in our concept of ordered liberty is combined with injury to reputation, *Davis* at 705 discussing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), procedural safeguards are necessary. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the posting of Constantineau's name as that of a problem drinker resulted in Constantineau's loss of freedom to purchase alcoholic beverages. Reputation alone, the Court held in *Davis*, is not a liberty or property interest protected by the Due Process Clause. *Davis* at 712.

Logically, whether reputation is besmirched as it relates to family responsibilities, marital obligations, honesty, or drug abuse, the significance of resulting injury can best be measured for purposes of providing an adequate remedy by assessing the amount of damage caused. Loss of employment, inability to attract new business, loss of freedom of choice in purchasing goods or in entering public places, and similar consequences would indicate injury which would likely be amenable to judicial resolution. In the present case there was no damage to reputation because no dissemination of information took place. Without dissemination, labelling is harmless. Injury to reputation requires a public response to the label applied. Being labelled a "perpetrator" injures no one if the appellation is not circulated.

Nevertheless, the federal district court found:

> The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis*. . . . (*Sims*, A. 82.)

Why the injury to Appellees was "far greater" than the damage to Davis' reputation is not explained. Perhaps the court felt that there is a hierarchy of epithets

or perhaps the undisseminated accusation of injuring a child is worse than being publicly called a thief.

The CANRIS prohibits dissemination of information stored therein. Access to CANRIS information is unavailable even to workers investigating reports of child abuse. An investigating worker may only ask the CANRIS whether there have been previous reports of child abuse or neglect. Though the court said that dissemination by the CANRIS of information was impermissible, there was no allegation at any point in these proceedings that dissemination occurred, and in fact none did occur.

Any other analysis of when due process is required in cases involving reputation creates the problem of placing monetary value on the right to privacy in some extraordinary way or of finding the very act of storing investigative information in the CANRIS mysteriously injurious. Appellants are employees or officials of a statewide agency. CANRIS is in reality a statewide investigative file. If it is constitutionally permissible to maintain child abuse investigative files, it seems unreasonable to allow a parent to be subject to the gathering and collecting of information if he stays in one place but free of the collected information's effect if he moves about. A law which had that effect would encourage the very behaviors which are dangerous to children by prohibiting use of information about abusive conduct which the investigating worker did not learn on his own. If investigatory files may be maintained by the State, it is difficult to comprehend what is intrinsically more dangerous or offensive to privacy and due process rights about putting reports in a computer than in a file folder. In addition to the obvious utility of the CANRIS, no injury to Appellees resulted from the use of this large investigative file to which access is carefully limited. The reports of child abuse in the instant cause were based on information from

eyewitnesses, not data retrieved from a malevolent or even impersonal computer.

If the State should decide to seek a change in the legal status of a parent believed to be endangering his child, judicial proceedings would be instituted with attendant due process protections. Up to that time nothing would have happened under Section 34.06 to affect a parent's liberty or property interest or even his reputation interest. What would have happened to this point is merely that an investigation would have been made.

Section 34.06 does provide for sharing information; however, such sharing is for statistical purposes and is anonymous. Names of persons are not provided by the CANRIS.

In discussing the limitations on personal rights of privacy this Court observed:

> [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. 113, 159 (1973). If the state has a compelling interest in protecting the health of an unborn child in the third trimester of his mother's pregnancy, so as to infringe upon the parent's personal right of privacy which earlier in her pregnancy permitted her to choose an abortion, it follows that the state's interest in protecting the health of a living battered child is at least equally compelling. The fact that all 50 states currently provide for mandatory reporting of incidents of child abuse and neglect convincingly demonstrates the compelling nature of the state's interest in protecting children. *See* Shepard, "The Abused

Child and the Law," The Rights of Children, 174, 182-83 (1973).

Where a child's well-being is an issue, the rights of the parent are not the chief consideration. The first and paramount duty is to consider the welfare of the child.

A parent's right of privacy as to the family relationship is not the primary right being protected by the CANRIS; rather, CANRIS is one limited attempt to facilitate protection of a child's personal right to be free from injury by adults. Since a parent has no right to injure his child, it would be unreasonable to permit him to harm his child and then claim a right of privacy in order to bar interference because the matter relates to the family relationship.

Quite the contrary, if the child is being physically injured by his parent, the state has both the right and the obligation to intercede to protect him. Indeed, to protect individual rights of a parent because of the family relationship, at the expense of the corresponding and sometimes competing individual rights of the child, is to give the parent greater individual and privacy rights because he is a family member, while commensurately diminishing the individual and privacy rights of the child because he is a member of the same family. To use the concept of family integrity to accomplish this end effectively swallows up the child in his parents' rights and obliterates his individual due process rights.

III. B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

The federal district court exceeded the bounds of established due process standards when it required that every Texas court must hold its hearing on an emer-

gency petition seeking ratification of an extrajudicial taking of a child no later than the "very day" of the seizure. The leading case on this point is *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C. 1973) (three-judge court), *aff. on appeal*, 414 U.S. 1139 (1974), without opinion. In *Newton* the plaintiffs claimed "that a parent has an immediate right to a hearing. . . ." and that a statute which allowed a five- to seven-day period to intervene between the state's assumption of custody of a child and the hearing was "unconstitutional in that it deprives the plaintiffs of custody without a hearing. . . ." *Newton*, at 786 and 785. The *Newton* court rejected the contention of the plaintiffs there and upheld the constitutionality of the challenged North Carolina statute. Appellees in the *Sims* case eventually abandoned an initially-asserted comparable contention. The *Sims* court upheld a ten-day period from seizure of a child by the State until a full adversary hearing was held. Neither Appellants nor Appellees challenge this holding. The emergency action authorized by Section 17.01 of the Texas Family Code is explicitly approved in *Sims* at A. 83. However, disagreement exists over the procedure to be followed in filing a petition and obtaining an ex parte order following an emergency removal of a child.

What remains at issue in this aspect of the appeal of the *Sims* decision is the timing of the ex parte presentation to a court of the request for judicial sanction of an extrajudicial taking of a child. It should be noted that in this cause the child was abused and removed by the Department on March 25, and the ex parte hearing was held the "very *next* day" or March 26. The *Newton* court did not require any more than such ex parte approval. The *Sims* court has required "the State to make all reasonable efforts to serve upon them [the parents] notice of this initial presentation to the court." (*Sims*, A. 83.) Appellants do not contest this

additional requirement. They only argue that it is impermissible to require that this emergency ex parte hearing (i.e., the initial presentation to a judicial authority) be held *not* "beyond the very day of seizure." (*Sims*, A. 83.) Such a conclusion not only is not required by the dictates of the concept of flexible due process principles for "extraordinary situations" stemming from the cases analyzed in *Newton* at 786-787, but also is inconsistent with the tenor of the guidelines set out in those and other "extraordinary situation" cases. *See Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); as well as, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971); and *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961). Indeed, the *Newton* court implicitly approved the North Carolina State court's clear refusal to afford the plaintiffs therein a hearing either at eighteen hours or at three days after the state had assumed custody of their child. At 787 and 784.

The relief Appellees plead for here is so limited as to belie its importance. They ask that the representatives of the governmental agency charged with protecting the children of Texas be allowed a reasonable time (i.e., not the "very day") to seek judicial approval for the assumption of emergency custody of children whose health or safety is endangered. If such relief is not granted, the Texas Department of Human Resources will be compelled by the *Sims* decision to return such children to conditions threatening their health and physical safety for no reason other than the inability to secure judicial sanction of an emergency seizure on the "very day" it occurs. It should also be noted that the real problem herein had to do with timing of the *adversary* hearing, but the federal district court allowed the statutory ten-day standard for that hearing to stand.

III. C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

The three-judge court held that an attorney ad litem must be appointed to represent the interests of a child who is the subject of a suit affecting the parent-child relationship. Appellants contest this ruling only insofar as the court included in its decision a requirement for representation at the ex parte hearing required in a Chapter 17 emergency proceeding. An examination of applicable constitutional standards will demonstrate that appointment of an attorney ad litem for this "very day" hearing is not necessary to fulfill due process requirements.

It is clear that due process standards are not static; they must be determined with regard to the time, place, and circumstances involved in the fact situation under consideration. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Cafeteria Workers, supra*, at 895. Appellants do not contest the federal district court's conclusion that an attorney ad litem should be appointed to represent the child in every suit affecting parent-child relationships which could be determinative of the child's status. The "very day" hearing, however, can never settle any right of any party; it is held merely to determine whether an emergency situation exists. If the State court decides that the child is in need of emergency protection, a full adversary hearing, including an attorney ad litem appointed to represent the child, will be held within ten days of the Department's taking custody of the child. It is only at this second hearing that the legal relationship between a parent and child can be altered. Appointment of an attorney ad litem for the initial hearing to determine whether there is an emergency is not necessary to meet the fundamental fairness standard for due process in juvenile proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), for analysis of how due process requirements should be determined in cases involving the constitutional rights of minors. This fundamental fairness requirement will be met by appointment of a legal representative for the child for the full adversary hearing which will be held no longer than ten days from actual seizure of the child.

An additional consideration is the undue burden such a requirement creates. If an attorney ad litem for the child were necessary for the initial hearing the practical implications would be overwhelming, especially in the large rural areas of the State and particularly when weighed against the short-term impact of the ex parte emergency hearing.

Finally, the ruling of the district court fails to take into consideration the existing procedures used by Texas district courts handling Title 2 matters. Some urban counties, for example, have permanent full-time guardians ad litem available to represent the interests of children, pursuant to Section 11.10 of the Texas Family Code. The decision by the three-judge court fails to make it clear whether the presence of a guardian ad litem is sufficient to fulfill due process standards, or whether both a guardian and an attorney ad litem must be present.

III. D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

The district court held that "[w]hile such a suit [affecting the parent-child relationship] is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt . . . the fundamental right to family integrity requires at the very least that the State . . .

prove its case by clear and convincing evidence." (*Sims*, A. 85.) This requirement that suits instituted for the protection of children be determined by a standard higher than preponderance of the evidence reaches far beyond the scope of due process requirements.

First, the three-judge court cited the district court opinion in *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975), for the proposition that the right to family integrity deserves a standard of clear and convincing evidence. In its appellate review of *Alsager*, the Eighth Circuit expressly declined to rule on the appropriate standard of proof at a parental termination hearing in order to leave open future consideration of the issue:

> Since we expressly reserve a ruling on the question of whether the Iowa statutory provisions at issue in this case are facially unconstitutional, there is no collateral estoppel effect to be accorded the district court's resolution of this question in the future.

Alsager v. District Court of Polk County, 545 F.2d 1137, 1138 (8th Cir. 1976). Thus, neither the Eighth Circuit nor this Court has ruled on the appropriate standard of proof in a suit affecting the parent-child relationship. The proposition that the appropriate standard is "preponderance of the evidence" rather than "clear and convincing evidence" is elaborated on in the discussion below.

Second, the three-judge court's sweeping and facile assertion that because the right is a fundamental right it mandates a clear and convincing standard of evidence is not supported by careful or persuasive analysis and is premature, especially in the area of child abuse and neglect which is developing rapidly and involves innumerable factors not ready quantifiable. Because of the difficulty in obtaining the facts constituting child abuse or neglect, the traditional standard of proof, which is preponderance of the evidence and with which juries are familiar, should apply.

Third, as discussed in the examination of the CANRIS system, a parent's right to rear his child as he sees fit is not the only important right to be weighed; the child's right to protection from abuse and neglect is of at least equal importance. Social workers who investigate child abuse cases are not trained in the gathering of evidence as are law enforcement officers. A standard of clear and convincing evidence seriously jeopardizes the child's right to protection; since by social custom as well as by statutory and constitutional law, family life is already shielded from public view and precipitous intervention.

Finally, an application of the clear and convincing evidence standard in suits affecting the parent-child relationship where conservatorship or termination is sought would be an unwarranted intrusion into state evidentiary law. In Texas, where litigating parties have a right to have fact issues in equity as well as at law tried before a jury, "clear and convincing evidence" is a judicial standard of factual sufficiency and may not be submitted to the jury. *State v. Turner*, 556 S.W.2d 563, 565-566 (Tex. 1977), *cert. denied*, 98 S.Ct. 1499 (1978); *Boenker v. Boenker*, 405 S.W.2d 843, 847 (Tex. Civ. App. — Houston, 1966, writ dism'd); *Andrews v. Dewberry*, 242 S.W.2d 685, 687 (Tex. Civ. App. — Ft. Worth 1951, writ ref'd n.r.e.); *Sanders v. Harder*, 227 S.W.2d 206, 209 (Tex. 1950); *See also Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975); *Omohundro v. Matthews*, 341 S.W.2d 401, 410-411 (Tex. 1960); *McCormick's Handbook of the Law of Evidence*, 2nd Edition (1972) p. 797, fn. 73. Thus, requirement of this higher standard would not only alter the Texas evidentiary system radically, it would also constitute a violation of the comity principles enunciated in *Younger* and its civil progeny.

Moreover, by its very consideration of the standard of proof issue, the federal district court acted beyond the scope of its powers as set out by Article III of the United States Constitution. By the terms of this Article, the judicial authority of federal courts is limited to cases or controversies. U.S. CONST. ART. III, § 2, *O'Shea*, *supra*, at 493. In order to establish a case or controversy a plaintiff must allege direct injury or threat of direct injury to himself. *O'Shea* at 494. If the issue argued by the plaintiff is merely hypothetical, its consideration is outside the scope of the power of the federal judiciary since any ruling would constitute a mere advisory opinion. *Hall v. Beals*, 396 U.S. 45, 48 (1969).

The federal district court reached the issue of standard of proof in suits affecting the parent-child relationship by stating that even though no such suit had been brought with regard to the Sims children, ". . . the spectre of a Chapter 15 [termination] suit involving the Sims family is sufficient to confer standing." (*Sims*, A. 78.) The federal district court incorrectly stated in its opinion that a Chapter 15 termination action had been filed on May 14, 1976; no such action was *ever* filed in this suit. The federal district court brought the issue of standard of proof into question by reasoning that since a Chapter 15 termination suit *could* eventually be brought by the Texas Department of Human Resources with regard to Paul Sims, this possibility conferred on the three-judge court the jurisdiction to consider the constitutionality of the standard of proof which would be used in such a suit. Actually, the court below should have viewed this possibility as a reason to allow the State court to proceed to the merits rather than as a rationale justifying its decision to return Paul Sims under the guise of preserving family integrity. The attempt to bring the standard of proof issue within the Article III grant of judicial authority falls short of constitutional standards for several reasons.

First, the federal district court justified its consideration of the standard of proof question by stating that "This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent." (*Sims*, A. 77.) Since Appellants repeatedly objected to the federal district court's consideration of Family Code provisions not actually involved in the factual dispute, it is clear that Appellants never agreed that the challenged provisions were interdependent. (Transcript of Proceedings, October 26, 1976, pp. 36, 153-55, and 182.) Thus, the three-judge court's examination of the standard of proof in suits affecting the parent-child relationship was not done by agreement of the parties.

Second, the criteria for a case or controversy set out in the two cases the federal district court employs to justify its consideration of the standard of proof, *O'Shea*, *supra*, and *Massachusetts v. Mellon*, 262 U.S. 447 (1923), are not met by the facts in this case. The language of *O'Shea* and *Mellon* expressly state "[a]bstract injury is not enough," *O'Shea* at 494; and the plaintiff must allege that he "has sustained or is immediately in danger of sustaining some direct injury," *Mellon* at 488. The Sims did not face the requisite direct injury by the challenged standard of proof provision. In the first place, no termination suit in which the "preponderance of the evidence" standard would have been used had even been brought against the Sims. They had never been subjected to the challenged statute and therefore suffered no injury by it. In the second place, the only possible threat of imposition of the challenged standard came from the caseworker Rex Downing's statement that he would probably recommend that termination of the parent-child relationship be sought. This alleged "threat" fails to meet the "immediate danger of direct injury" criterion set out in *Mellon*, since a single caseworker does not have the authority to make the decision to institute a termination proceeding. Under Texas Department of Human

Resources regulations, when a child is to be removed from his home, the decision of whether court action will include a request for termination must be concurred in by the supervisor and the caseworker. Thus, Mr. Downing's statement that he would recommend that termination be sought falls far short of proving that the Sims suffered the requisite threat of injury; certainly they suffered no actual injury.

Finally, even if the Sims had faced direct injury from a termination proceeding, the allegations regarding the standard of proof fail to meet the "case or controversy" standard since the child in question was returned to his parents before the trial on the merits. In order to constitute a case or controversy, the actual controversy must exist at the time of appellate review and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 123-129 (1973). Thus, since there is presently no reasonable expectation that Paul Sims will be the subject of a suit affecting the parent-child relationship which would use the challenged standard of proof, the issue fails to meet the case or controversy standard for lack of ripeness, and the three-judge court ruled on this issue outside the scope of its constitutional power.

CONCLUSION

The three-judge court should have abstained. There was no jurisdiction as to many of the constitutional issues raised. The case was incorrectly decided on the merits. Appellants pray that the Amended Judgment of the court below be reversed and the case be remanded with instructions to dismiss the Complaint or, in the alternative, reversed and judgment rendered for Appellants on the merits.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

OF COUNSEL:

KATHRYN A. REED
Assistant Attorney General

ANN CLARKE SNELL
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

Attorneys for Appellants

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Appellants' Brief on the Merits have on this the _____ day of December, 1978 been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

JOHN QUINCY CARTER
ROBERT BYRD
WENDELL E. COOPER PORTER
Gulf Coast Legal Foundation
609 Fannin Street, Suite 1900
Houston, Texas 77002

MARTIN J. GRIMM
1318 Pech Road
Houston, Texas 77006

DAVID H. YOUNG
Assistant Attorney General